



Advisory Opinion 14-005

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2013). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On April 15, 2014, the Information Policy Analysis Division (IPAD) received an advisory opinion request from Ken Tschumper, dated April 14, 2014. In his letter, Mr. Tschumper asked the Commissioner to issue an advisory opinion regarding the Houston County Board of Commissioners members' conduct under Minnesota Statutes, Chapter 13D, the Minnesota Open Meeting Law (OML).

On April 23, 2014, IPAD wrote to Teresa Walter, Chair of the Board. In its letter, IPAD informed Ms. Walter of Mr. Tschumper's request and gave the members of the Board an opportunity to explain their position. On May 8, 2014, IPAD received a response, dated same, from Jay T. Squires, attorney for the Board.

A summary of the facts as provided by Mr. Tschumper follows:

For several years the Houston County Board has dealt with matters relating to the Erickson Quarry, proposed silica sand mine located in Yucatan Township, Houston County. It is also currently considering various options for amending the County Zoning Ordinance to prohibit or regulate silica sand mining.

On Tuesday, April 8th, 2014, the Board, at the suggestion of their attorney Jay Squires, closed their weekly meeting for the stated purpose of general discussion of ongoing matters related to the Erickson Quarry. In addition, it appears the closed meeting also included discussion related to amending the Zoning Ordinance.

According to Mr. Tschumper, Mr. Squires participated in the April 8 meeting via speaker phone. Mr. Tschumper provided a transcript of the recording of the meeting. Mr. Squires' comments to the Board follow:

As I understand, there are a couple issues that the board wishes to talk about today. One involves specifically the Erickson property and the status of that property with respect to the history of events and Mr. Erickson's ... request to recommence mining.

The second issue I understand involves the county's consideration of discussion of potential future ordinances in the area of silica sand mining.

I think the issues are separate, and with respect to the former, there have been a number of threats of litigation, and, of course there is a history of past litigation. I would like to be able to talk to the county board candidly about the strengths and weaknesses of the various positions that the county may have in response to Mr. Erickson's pending request and in light of the threats of litigation and in light of that, that would be a proper topic of a closed meeting.

In discussing the second topic, in discussing future ordinances, that would not, in my judgement, be a proper topic of a closed meeting, so what I recommend to the board, [y]ou could convene into closed session on the basis of the attorney client privilege exception in the open meeting law for the reason that's discussed. There would be no discussion of the ordinance options of a more general nature which would be in closed session, we would reopen and then if the board wishes [to discuss] that second topic....

Issue:

Based on Mr. Tschumper's opinion request, the Commissioner agreed to address the following issue:

Did the Houston County Board of Commissioners comply with Minnesota Statutes, Chapter 13D, at its April 8, 2014, meeting?

Discussion:

Minnesota Statutes, section 13D.01, subdivision 3, states, "[b]efore closing a meeting, a public body shall state on the record the specific grounds permitting the meeting to be closed and describe the subject to be discussed."

The Commissioner has addressed the three requirements to close a meeting in previous opinions. (See Advisory Opinions 06-012, 06-020, 07-018 and 13-012.) In 06-020, the Commissioner described those requirements as: "1) a statement on the record; 2) the specific grounds allowing the meeting to be closed (the statutory authority); and 3) a description of the subject to be discussed (the description must go beyond simply identifying the subject)."

Mr. Tschumper asked whether the Board violated the Open Meeting Law by "failing to meet the specific legal requirements for closing the meeting, namely did they cite the specific statutory section that permits them to close the meeting, or identify the statutory authority to permit closing the meeting?"

In his comments to the Commissioner, Mr. Squires wrote:

Mr. Tschumper asserts in his April 14, 2014, letter, incorrectly, that the County did not comply with the [section 13D.01, subdivision 3], requirement because the County did not "... identify any specific statutory authority" Mr. Tschumper's letter references IPAD Opinion 06-020, seemingly relying on this opinion for his position.

.... IPAD did not, as Mr. Tschumper would seem to imply, opine that citation to a statute subdivision or subpart was necessary to state the "specific grounds" for closure. Rather, the opinion only suggests that citation to the particular subdivision or subpart is an

“efficient way” to state the specific grounds. In fact, the statute itself does not require the statement of a statutory citation.

Mr. Squires is correct, the plain language of the OML does not require a public body to cite the specific statute upon which it relies to close a meeting. In 06-020, the Commissioner suggested that doing so is the simplest way for a public body to fulfill its obligation to inform the public of its grounds for closing a meeting, i.e., here, the Board could have cited section 13D.05, subdivision 3(b). Instead, Mr. Squires advised the Board it *could* do so based on the attorney-client privilege. The Commissioner still recommends that public bodies cite the specific provision of the OML (or other law) that permits closing a meeting, in order to avoid this kind of misunderstanding.

Mr. Tschumper also asserted that the Board violated the Open Meeting Law because it did not “specifically state what exactly will be discussed” in closed session. He cited a Minnesota appellate court case, *The Free Press v. County of Blue Earth*, 677 N.W.2d 471 (Minn. Ct. App. 2004) in support of his position.

In 06-020, the Commissioner discussed the Court’s holding:

The final element to be considered is whether the notice that the Board has used “describes the subject to be discussed.” The Court of Appeals has provided direction on how this language is to be interpreted. In *The Free Press*, the Court was asked to decide if a statement that a meeting is “being closed for a discussion of pending litigation under the attorney-client privilege” met the requirements of section 13D.01, subdivision 3. In analyzing that statement used by Blue Earth County, the Court found that “attorney client privilege” provided the grounds and “pending litigation” *identified* the subject to be discussed, but did not *describe* the subject as required by the statute. *The Free Press* at 476 (emphasis in the original).

Accordingly, before closing a meeting, a public body must describe both the specific grounds permitting the meeting to be closed and the subject to be discussed.

In his comments, Mr. Squires wrote:

Again, a simple reading of the transcript excerpt of the pre-closure discussion refutes Mr. Tschumper’s assertions. In particular, the transcript indicates legal counsel, referencing the Erickson property, litigation, and the pending request to recommence mining, stated:

... I would like to be able to talk to the County Board candidly about the strengths and weaknesses of the various positions the County may have in response to Mr. Erickson’s pending request and in light of the threats of litigation

Contrary to Mr. Tschumper’s unsupported assertion, the above statement clearly identifies the “subject to be discussed” in closed session.

Applying the holding from *The Free Press* to these facts, The Commissioner believes that Mr. Squires “described the subject to be discussed” with the specificity required by the Court. In support of that conclusion, Mr. Squires referred specifically to the legal issues

involving the Erickson property, including and “the status of that property with respect to the history of events and Mr. Erickson’s ... request to recommence mining.”

However, having said that the Board’s *attorney* adequately described the grounds permitting the meeting to be closed and described the subject to be discussed, section 13D.05, subdivision 3, requires *the public body to make a statement on the record* before closing a meeting.

In his comments to the Commissioner, Mr. Squires repeated what he told the Board at the meeting: “[y]ou *could* convene into closed session on the basis of the attorney client privilege exception in the open meeting law for the reason that’s discussed.” The Board then voted directly to go into closed session; no Board member made the required statement on the record. After they voted yes, Mr. Squires said “on the basis as discussed.”

The Board, not its attorney, has the authority to close a meeting, and it is the Commissioner’s opinion that the Board’s reliance on its attorney’s statements did not meet the strict statutory requirement. The Board simply needed to state its clear intention to close the meeting for the reasons Mr. Squires advised, i.e., on the basis of the attorney-client privilege, to discuss the Erickson property, etc., as noted above.

Finally, Mr. Tschumper stated his belief that the Board violated the OML “by discussing a matter not described or proposed for discussion in the closed meeting.” He wrote that “there is evidence” that the Board discussed the proposed silica sand mining ordinances during the closed portion of the April 8 meeting. According to Mr. Tschumper:

Immediately after reconvening in open session a motion was made and passed releasing to the public a communication between [Mr.] Squires and [County staff] relating to ordinance development. There was no discussion of taking this action prior to the meeting being closed. There was no announcement that this matter was to be discussed in closed session or why. But from the video the conclusion is that some kind of discussion on this matter took place during the time the meeting was closed to when it was reopened.

According to the transcript, when the Board reconvened the meeting in open session, it announced a decision made in closed session, and then a Board member stated:

We had Mr. Squires look at some information for us as far as whether a ban would be possible. We did get a document back from him, and I would make a motion that that [sic] we waive attorney client privilege on that particular document and make it public.

Mr. Tschumper believes that statement is evidence that the Board discussed the proposed ordinance amendments during closed session. According to the transcript, Mr. Squires did not propose to the Board that it could discuss whether or not to waive the privilege regarding that document in closed session.

In his comments to the Commissioner, Mr. Squires stated:

Mr. Tschumper's last stated issue asserts the County discussed matters not related to the Erickson property and litigation, namely, the adoption of a regulatory ban on silica sand mining. However, Mr. Tschumper offers no factual evidence in support of such a claim. Rather, he suggests the Board must have had substantive discussion on this topic because, after reconvening in open session, the Board voted to release a privileged opinion letter from legal counsel on banning silica sand mining.

The Board did not, in fact, engage in substantive discussions that Mr. Tschumper baldly asserts occurred. Here, the transcript excerpt includes a discussion with the Board that the silica sand mining ban topic would not and could not be discussed in the closed session. Why would the Board then close the meeting and discuss the very matters they had just been told would and could not be discussed?

In short, IPAD has been provided with no facts by Mr. Tschumper that the subject of a silica sand mining ban was discussed in closed session. Consequently, IPAD cannot conclude or determine a violation of the Open Meeting Law occurred.

The statement the Board member made is ambiguous, and the Commissioner believes Mr. Tschumper's interpretation is reasonable. Mr. Squires states that the Board did not engage in "substantive" discussion of matters not covered by the attorney-client privilege. He does not specifically deny that the Board had *any* discussion about waiving the privilege regarding the document in question. Pursuant to section 13D.05, subdivision 1(c), the Board was not required to electronically record the closed session per the privilege. Thus, there is no record of the closed meeting, and the Commissioner therefore cannot determine whether the Board improperly discussed waiving the privilege in order to release the document.

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issue Mr. Tschumper raised is as follows:

The Houston County Board of Commissioners did not comply with Minnesota Statutes, Chapter 13D, at its April 8, 2014, meeting, because the Board did not make a statement on the record before closing the meeting, as required by Minnesota Statutes, section 13D.01, subdivision 3. Had the Board made the statements the attorney did, i.e., providing the grounds and describing the subject it would discuss, the Board would have complied with Chapter 13D.


Spencer Cronk
Commissioner

June 2, 2014